90-1163

No. _____

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAUL PALOMO

VS.

STATE OF TEXAS

Petition For Writ Certiorari To The
Court Of Appeals
First Supreme Judicial District
Houston, Texas

GEORGE J. PARNHAM
440 Louisiana #475
Houston, Texas 77002
713/224-3967

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether a person has been "charged" with a criminal offense, within the meaning of the Extradition Clause of the United States Constitution, when the accusing instrument consists of an affidavit executed before a judicial officer, and the officer's court seal is not affixed to the instrument, thereby rendering the affidavit void.

(1) Whether a person has received sufficient constitutional notice of the nature and cause of the offense for which he has been charged with, for purposes of interstate extradition, when the defendant cannot determine from the face of the demanding state's charging instrument whether the defendant is charged with a felony or misdemeanor. California v. Superior Court of California, 482 U.S. 222, 107 S.Ct. 2433, 96 L.Ed.2d 332 (1987).

LIST OF INTERESTED PERSONS

The following persons are interested parties:

Presiding Judge At Trial

The Honorable Michael McSpadden

Attorneys for the State of Texas

Mr. Calvin Hartman

Attorney for Appellant

Mr. George J. Parnham (at trial and on appeal)

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

LIST OF INTERESTED PERSONS 2

TABLE OF AUTHORITIES 4

OPINIONS BELOW 5

JURISDICTION 6

STATUTES INVOLVED 6

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

California v. Superior Court of California,
482 U.S. 222, 107 S.Ct. 2433, 96 L.Ed.2d 332 (1987) 1, 7

Michigan v. Doran,
439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978) 7

Roberts v. Reilly,
116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544 (1885) . . 7

STATUTES

U.S. Const. art. IV. sec. 2 6

28 U.S.C. 1257 6

Tex. R. App. P. 44(d) 6

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Petition For Writ Certiorari To The
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OPINIONS BELOW

The Court of Criminal Appeals refused appellant's appeal without written order. The opinion by the Court of Appeals was unpublished, and is set out in Appendix "A." The Court of Appeals denied appellant's motion for rehearing without a written opinion. The decision of the district court was unpublished, and is also set out in Appendix "A."

JURISDICTION

This is an appeal from a writ of habeas corpus attacking the appellant's extradition to the State of California for the offense of theft. The district court denied habeas corpus relief on June 14, 1990. The Court of Appeals affirmed the order of the trial court in an unpublished opinion entered on September 20, 1990. Appellant filed a motion for rehearing on September 28, 1990. Appellant's motion for rehearing was denied without a written opinion on October 18, 1990. The Court of Appeals denied appellant's petition for review on December 12, 1990. The decision by the Court of Criminal Appeals to refuse review constitutes a final decision on appellant's writ of habeas corpus. Tex. R. App. P. 44(d). This Court has jurisdiction pursuant to 28 U.S.C. 1257.

STATUTES INVOLVED

U.S. Const. art. IV. sec. 2:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

STATEMENT OF THE CASE

Petitioner is a Texas resident sought by the State of California for the offense of theft. Petitioner challenged the papers sent by California on the grounds listed above through a writ of habeas corpus. The trial court denied relief, and ordered the petitioner to be remanded into custody of the Harris County Sheriff's Department to await extradition to California. Petitioner raised the same issues in the Court of Appeals, and in the Texas Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THIS PETITION TO DETERMINE WHETHER A DEFECTIVE AFFIDAVIT CONSTITUTES A CRIMINAL CHARGE WHICH WOULD GIVE THE DEMANDING STATE CONSTITUTIONAL AUTHORITY TO EXTRADITE A CITIZEN OF ANOTHER STATE.

In California v. Superior Court of California, 482 U.S. 222, 107 S.Ct. 2433, 96 L.Ed.2d 332 (1987), this Court held where an accused is "substantially" charged with a criminal offense in one state, extradition proceedings are summary in nature, and all defenses concerning the technical pleadings should be raised in the demanding state. See also Michigan v. Doran, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978). However, it is also clear that at some point, a charging instrument in the demanding state is so utterly defective as to take the matter out of the nature of a "substantial charge" for purposes of the constitutional obligation of one state to surrender one of it's citizen to another. Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544 (1885). The failure of California to affix a court seal to an affidavit or complaint sworn before a judicial officer gives this Court just such an opportunity to draw the line.

II.

THIS COURT SHOULD GRANT THIS PETITION TO DECIDE THE MINIMUM LEVEL OF NOTICE A DEMANDING STATE MUST PROVIDE IN A CRIMINAL CHARGE BEFORE IT CAN CONSTITUTIONALLY DEMAND ANOTHER TO SURRENDER ONE OF IT'S CITIZEN TO THAT STATE.

As urged in Petition's First Reason For Granting This Writ, the constitution must certainly provide what, at a minimum, the demanding state must allege in an instrument before a citizen is charged with an offense for purposes of interstate extradition. Inherent in any minimum standards is the constitutional right to notice of the nature and cause of accusation. The failure of the complaint filed in California to recited, on its face, sufficient facts or circumstances to show whether petitioner is charged with a felony or misdemeanor grade offense, gives this Court an opportunity to decide what minimum level of notice is constitutionally required.

CONCLUSION

For the reasons listed, above, this Court should grant this Petition For Writ of Certiorari, and order full briefs and oral argument on the same.

Respectfully submitted,

GEORGE J. PARNHAM
440 Louisiana #475
Houston, Texas 77002
713/224-3967

ATTORNEY FOR PETITIONER

APPENDIX "A"

Decision by Court of Appeals

Written Order by District Court

Opinion In The Court of Appeals

For The First District of Texas

No. 01-90-00536-CR

EX PARTE RAUL PALOMO, Appellant

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 558264

This is an appeal from the trial court's order in a habeas corpus proceeding remanding appellant to custody for extradition to the State of California to answer charges of grand theft of personal property with special allegations, forgery of an endorsement. We affirm.

Initially, we note that the executive warrant of the Governor of Texas, together with the supporting papers, establish a prima facie authorizing appellant's extradition. Ex parte Larson, 494 S.W.2d 179, 180 (Tex. Crim. App. 1973); TEX. CODE CRIM. P. ANN. art. 51.13, sec.3 (Vernon 1979).

Appellant asserts two points of error. His first point of error asserts that the supporting affidavit for the Governor's warrant is void and does not substantially charge him with a crime in California because no court seal or stamp is affixed to the jurat in the affidavit.

Appellant asserts that since no affidavit supports the information, then the State of California has chosen to substantially charge him with a crime through an "affidavit executed before a magistrate." Article 51.13, sec. 3 (the extradition request must be accompanied by either an "information supported by affidavit" or a "copy of an affidavit before a magistrate"). Appellant further asserts that since the affidavit was purportedly sworn to before a California Superior Court Judge, it is void because the jurat in the affidavit does not have affixed to it a court stamp or seal.

The affidavit in question indicates on the top of page one that the affiant swore to it in the Superior Court of the state of California for the County of Los Angeles. The jurat in the affidavit appears on page two. It is signed, and dated. The following language appears underneath the signature line in the jurat, "Judge of the above-entitled Court."

We are aware of no requirement that the jurat was required to have a court stamp or seal affixed to it. Article 51.13, section 3 requires an "affidavit before a magistrate." An affidavit before a superior court judge is sufficient. Ex parte Mungia, 478 S.W.2d 440, 441 (Tex. Crim. App. 1972) (affidavit sworn to before a judge of a Colorado district court was sufficient); see also Ex parte Wammack, 482 S.W.2d 859, 860 (Tex. Crim. App. 1972) (affidavit does not have to be made before a magistrate, and it is sufficient if it is made before a notary public). A jurat is a certificate of a competent administering officer that the writing is sworn to by the person who signed it, and is sufficient if it is dated and shows the official capacity of the administering officer. Neely v. State, 144 Tex. Crim. 92, 93, 161 S.W.2d 294 (1942) (op. on reh'g); Murphy v. State, 132 Tex. Crim. 202, 203, 103 S.W.2d 765, 766 (1937). The jurat is sufficient because it is dated, and it shows the official capacity of the officer taking it. The supporting affidavit is not void or fundamentally defective.

Appellant's first point of error is overruled.

Appellant's second point of error asserts that the information fails to give him proper notice of whether the charged offense is a felony or a misdemeanor. He claims that he does not have adequate notice of the grade or level of the offense with which he is charged.

Article 51.13, section 3 requires only that the affidavit "substantially charge the person demanded with having committed a crime under the laws of that State." Here, the extradition papers attached to the Governor's warrant include copies of the statutes defining the offenses with which appellant is charged and setting out the punishment range for those offenses. Appellant has been put on notice of offense with which he is charged and the precise punishment range.

Moreover, article 51.13, section 3 does not require that appellant be informed of the particular grade or level to the offense with which he is charged. The question is whether

appellant is substantially charged with a crime, and, unless clearly void, the validity of an affidavit and its sufficiency as a criminal pleading are left to the courts of the demanding state and not to the courts of this state. Ex parte Powers, 391 S.W.2d 413, 414 (Tex. Crim. App. 1965); see also California v. Superior Court, 482 U.S. 400, 406 (1987) (extradition proceedings are not appropriate for entertaining defenses or determining the guilt or innocence of the charged party).

Appellant's reliance an Adley v. State, 718 S.W.2d 682 (Tex. Crim. App. 1985), is misplaced because it involved a conviction under an unconstitutionally vague penal statute. Here, we are dealing with the issuance of an executive extradition warrant where the focus is narrower than it would be in a trial resulting in a conviction. Powers, 391 S.W.2d at 414 (in extradition cases, unless clearly void, the validity of an affidavit and its sufficiency as a criminal pleading will be left to the courts of the demanding state); see also Superior Court, 482 U.S. at 407. The proper forum for the claims appellant makes under this point is California and not Texas.

Appellant's second point of error is overruled.

The judgment denying appellant habeas corpus relief and remanding him to custody for extradition to California is affirmed.

PER CURIAM

Justices Duggan, Cohen, and Price[1] sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered
True Copy Attest:

Kathryn Cox
Clerk of Court

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1. The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

HABEAS CORPUS

MINUTES OF THE 209 DISTRICT COURT

OF HARRIS COUNTY, TEXAS

AT MAY TERM, A.D. 1990

EX PARTE

NO. 558264 6/14, A.D. 1990

RAUL PALOMA

This day came on to be heard before me this application for the Writ of Habeas Corpus against RAUL PALOMA, and the said respondent JOHNNY KLEVENHAGAN, having produced before me the person of the said RAUL PALOMA, I proceeded to hear the said application, and after having examined the Writ and the return of the respondent JOHNNY KLEVENHAGAN and all papers and documents attached thereto, and having heard the testimony offered on both sides, I am of the opinion that the said RAUL PALOMA is legally held in custody and under restraint of his liberty by the said respondent JOHNNY KLEVENHAGAN.

It is therefore ordered and adjudged that the application of the said RAUL PALOMA herein be denied, and that the said RAUL PALOMA be and he is now hereby remanded to the custody of the said respondent.

Signed and entered on this the 14 day of June A.D. 1990.

Michael D. McSpadden/s
JUDGE 209 DISTRICT COURT
HARRIS COUNTY, TEXAS